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No. 91-23

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

JOELLYN GRAY, CHRISTOPHER M. SMITH, MALCOLM HALL, JR., BEEKMAN V. BEAVERS, DAVID ERB, and ALBERT DURYEA,

Petitioners,

v.

THE TOWN OF DARIEN, The Board of Selectmen, Board of Finance and other Boards and Commissioners, acting singly or in concert, in whole or in part, together with all officers, employees, agents and attorneys thereof,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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THE TOWN OF DARIEN, The Board of Selectmen, Board of Finance and other Boards and Commissioners, acting singly or in concert, in whole or in part, together with all officers, employees, agents and attorneys thereof,

Respondents.

ARGUMENT

Respondents have rewritten the history of the February 7, 1989 Darien, Connecticut bond referendum election in order to portray the election as being fair instead of an election in which the government officials of Darien so manipulated the process to deny the opponents of "city hall" their fundamental right to vote. A brief review of the facts, set out more fully in the Petition, is necessary to put the Respondents' claims in context.

The referendum election was an attempt by citizens of Darien to overturn a decision of the town officials to

indebt the town with an issuance of bonds to finance public moderate-income rental housing. In that election, the Board of Selectmen reduced the number of polling places from the normal four-to-six to only one, and sharply reduced the operating hours for that single polling place from the normal 6:00 a.m. to 8:00 p.m. period to 12:00 noon to 8:00 p.m.

The limitation on voting was significant because Section 58(e) of the Darien Town Charter requires that in order for the citizens of Darien to overturn a decision of the town government in a referendum election, the votes of opponents of the town decision both must constitute a majority of the votes cast and must exceed 25% of the town's registered voters as of the last annual municipal election.

The obstacles to voting prevented the opponents of the town officials' bond decision from achieving electoral success because low voter turnout worked in favor of the proponents of the town establishment's position. The Darien Town Charter provision and the manipulation of the voting procedures in Darien had a significant impact upon the Petitioners' right to vote. Although the citizens won an overwhelming percentage of the vote, they failed to "win" the election because they fell short of the 25% threshold level.

Respondents attempt to camouflage their manipulation of the electoral process by portraying the bond purchase decision as a popular democratic decision and the referendum election procedures as being dictated by state law and made by individuals other than the Darien Board of Selectmen (Op. 2-10).

In an attempt to bolster the legitimacy of the 25% threshold referendum requirement, the Respondents portray

the election of Town Selectmen as being based upon a broad popular consensus. Respondents state that the citizens of Darien had a keen interest in local elections and that there was intense competition for Darien town government positions (Op. 3). However, while Section 58(e) requires a minimum vote of 25% of the electorate, there is no minimum vote requirement for election to the Darien Board of Selectmen. In fact, over the last ten years many members of the Darien Board of Selectmen have been elected by less than 25% of the registered voters -- the threshold level required for the defeat of the bond issue.

Respondents state that the hours of the polls were in conformity with Connecticut Gen. Stat. § 7-9b (Op. 6). However, Connecticut Gen. Stat. § 7-9b provides the *minimum* hours which polls must be open in a referendum election. The statute authorizes municipalities to open polls in a referendum election as early as 6:00 a.m. --- the time the polls were opened in previous elections in Darien, including referendum elections. While limited election hours may be legitimate in some circumstances, in the 1989 Darien bond referendum election the contraction of election hours served the purpose of favoring one side in the election -- the government officials -- at the expense of the opponents of the bond issue. That was because limited hours served as a barrier to voting, thereby making it more difficult to reach the 25% threshold required by the Darien Town Charter.

Respondents also cite a Connecticut Secretary of State Advisory Opinion concerning the number of polling places as a basis to support the town officials' decision to limit the number of polling places to one. That advisory opinion states that "municipalities *may* choose to use fewer polling places than normally used" (emphasis added). The town had the right to open all the polling

places -- as it had done in past elections -- but did not do so. If the special election did not have the 25% threshold level requirement, the reduced number of polling places might not have been significant. However, as with the reduced hours the polls were open, the use of only one polling place was an impediment to voting and hence worked in favor of the town officials and against those who were fighting "city hall."

Furthermore, even if the state law mandated rather than advised Darien with respect to the number of polling places and the hours voting was permitted, Darien could not rely on state statute to justify violations of constitutional rights.

Respondents also claim that the decision to limit the number of polling places and the hours of the election was made by the Town Clerk and Registrars of Voters for both major parties (Op. 7). However, the Town Clerk has no authority to set the hours of the referendum election. That authority is held solely by the town selectmen. Darien Charter § 58 (b). With respect to the limitation of the number of polling places to only one, Registrar Carolyn Miller testified at the hearing on the plaintiffs' motion for a preliminary injunction, "We were not consulted as to whether it was a good idea or bad idea to have one polling place. The decision was made and we were asked if we could handle it."

Respondents claim that the case is now moot (Op. 10 n. 11). Nothing could be further from the truth. No bonds have been issued by the Town of Darien. The proposed housing projects have not been built, and the land stands idle. If the Petitioners prevail, the town could sell the land, thus restoring the pre-referendum status of the housing project.

In their argument, Respondents claim that the decision below does not conflict with any decision of this or any other federal court (Op. 10). As pointed out in the Petition, the decision of the court below conflicts with decisions of this and other courts concerning the Equal Protection Clause of the Constitution (Pet. 11-18). The decision below conflicts with this Court's decisions striking down voter classifications where groups of voters have been unconstitutionally subject to limitations on their voting rights. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Gray v. Sanders*, 372 U.S. 368 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

In the case at bar there is an identifiable group or category that is singled out as a "discrete and insular minority" for special treatment. That group is those residents who oppose "city hall." The only elections that trigger the 25% threshold level are those that involve attempts to overturn decisions of the government officials. The class singled out are those voters who oppose the actions of the entrenched politicians.

While this Court struck down as unconstitutional governmental in the above cases classifications limiting voters who are outside the government power structure, the court below upheld a governmental classification which so diluted the right to vote of Petitioners -- citizens on the outside of the political establishment -- so as to effectively deny them their right to vote.

Respondents attempt to justify this infringement upon the right to vote by arguing that the minimal vote

requirement is rationally[1] related to a legitimate state interest -- preventing an unrepresentative minority of citizens from overturning laws (Op. 16-17). There is an implicit assumption in Respondents' argument that the town officials represent the views of the majority of voters. However Darien town selectmen are often elected by less than the numbers of voters who supported the rejection of the bond issue. There is no evidence that supports Respondents' theory that the threshold requirement will protect against minority rule. Furthermore, in this case the minimal vote requirement was combined with governmental decisions that effectively assured a low voter turn-out. The restriction on polling places and hours does not demonstrate a concern to prevent minority rule; rather, it represents an attempt to prevent majority rule.

Respondents further argue that this Court's decision in *Gordon v. Lance*, 403 U.S. 1 (1971), mandates the decision below (Op. 10-13). However, as Petitioners pointed out in the Petition for a Writ of Certiorari, *Gordon* not only does not compel the decision of the court below but is inconsistent with it (Pet. 13-18).

Gordon is distinguishable from the case at bar for a number of reasons. First, the state interest served by the supermajority requirement in *Gordon* was to prevent government from easily indebting "generations yet unborn." *Gordon* at 6. In the case at bar the election procedure facilitates indebting "generations yet unborn."

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[1]Since there is a fundamental right -- the right to vote -- that is burdened in this case, the government must show a *compelling* and not merely a rational interest to justify the infringement. *Williams v. Rhodes*, 393 U.S. 23 (1968).

Secondly, the supermajority requirement challenged in *Gordon* was a simple supermajority. The case at bar combines a supermajority requirement with actions by the Darien town officials to prevent a fair referendum. Had the hours of operation of the polling places and the number of polling places not been constricted, the opponents of the bond issue would likely have been able to win a supermajority. In most elections, the candidate or the issue which receives a majority of the votes cast wins no matter how low the voter turnout. Even where supermajorities are required, the voter turnout is generally irrelevant as long as the winner achieves the percentage necessary to pass the ballot measure. However, in the Darien bond referendum election, the voter turnout was a key factor in deciding whether the politicians who controlled the Darien town government or the opponents of "city hall" would win the election. Because the Darien Town Charter requires opponents of the town officials' position to achieve not only a majority of the votes to overturn a decision of the town officials but also a threshold vote of 25% of the eligible voters -- as of the last general election -- voter turnout was the key to success or defeat.

Finally, the supermajority provision upheld in *Gordon* did not single out an identifiable group or category for discriminatory treatment; the referendum election provision of the Darien Town Charter does. In *Gordon*, this Court held that the supermajority provision at issue in that case "singles out no 'discrete and insular minority' for special treatment" *Gordon*, 403 U.S. at 5. Respondents argue that this case is similar to *Gordon* and that "it is simply not possible to know or even guess in advance who will be helped or hurt by Section 58(e)" (Op. 14). It is possible to know who is hurt by Section 58(e). The citizens hurt by Section 58(e) are those citizens who wish to "fight city hall" (Pet. 11-18).

Citizens on the outside of the political establishment are an identifiable group of people whose right to equal protection of the laws has been violated by Darien government officials. This Court has recognized that government officials may not discriminate against political "outsiders." *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Clements v. Fashing* 457 U.S. 957 (1982). In *Celebrezze*, this Court recognized the supporters of an independent candidate as a class consisting of "an identifiable segment of . . . . independent voters." 460 U.S. at 792. Petitioners are an identifiable segment of independent voters -- the opponents of "city hall."

Finally, as discussed above, Respondents' argument that Petitioners failed to distinguish this case from *Gordon* is false. Furthermore, when this Court decided *Gordon* it distinguished *Gordon* from *Hunter v. Erickson*, 393 U.S. 385 (1969). While Petitioners have distinguished this case from *Gordon*, Respondents have ignored this Court's decision in *Hunter*. As pointed out in the Petition, this case is more like *Hunter* than *Gordon* since the Darien Town Charter imposes a special election requirement only when the policies of the political establishment are challenged (Pet. 14). The decision of the court below conflicts with *Hunter* and the equal protection cases involving the fundamental right to vote. It is those cases, rather than *Gordon*, which control the issues raised by this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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